IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 834 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DR.SURESH NAROTTAMBHAI KUBAVAT

Versus

THE STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 834 of 2004

MR. ND NANAVATI SR. ADVOCATE WITH MR. HRIDAY BUCH

FOR NANAVATY ADVOCATES for Petitioner No. 1

MR VM PANCHOLI APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 23/08/2004

ORAL JUDGEMENT

1. Rule. Mr. VM Pancholi, learned APP appears and waives service of notice of rule on behalf of respondent

No.1 - State.

2. By filing this petition under Articles 226 and 227 of the Constitution, the petitioner has prayed to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate direction and/or orders to quash and set aside the order dated 3.8.2004 at Annexure D to the petition passed by the learned Chief Judicial Magistrate, Junagadh by which he has straightaway issued non-bailable warrant against the petitioner making it returnable on 31.8.2004.

3. It is alleged that deceased Jitendra, son of the complainant, was working in the clinic of the present petitioner as a compounder and upon levelling allegations of theft and misappropriation, deceased Jitendra was driven out and terminated from service. Upon feeling that a police complaint will be lodged by the petitioner, deceased Jitendra consumed poisonous tables at the house of the complainant. The complainant came to know about the said fact upon reaching the house when his son Jitendra was vomiting and it is alleged that said Jitendra died and suicidal note was found from him which revealed the aforesaid aspect and, therefore, the FIR came to be lodged on 21.6.2001 vide CR No.182 of 2001 with Junagadh City "B" Division Police Station after occurrence of the incident on 10.5.2001 for alleged commission of the offence under Section 306 of IPC. The said FIR was investigated and the investigating officer filed a report under section 173 of the Code of Criminal Procedure ('the Code' for short) and sought "C" Summary on 15.1.2002 from the Court of learned Chief Judicial Magistrate, Junagadh as no ingredient of section 306 of the IPC was satisfied.

4. Upon receipt of the said report, the learned Chief Judicial Magistrate, Junagadh issued notice to the complainant and after considering the objections raised by the complainant, the learned Chief Judicial Magistrate, Junagadh vide order dated 10.1.2002 rejected the request of the investigating officer to grant "C" summary and further directed to initiate inquiry under section 202 of the Code. After recording preliminary statement of the witnesses, the learned Chief Judicial Magistrate, Junagadh vide order dated 3.8.2004 concluded that offence under section 306 of the IPC is made out against the petitioner and directed to register the complaint for the said offence against the petitioner and also issue non-bailable warrant against the petitioner making it returnable on 31.8.2004 which has given rise to the present petition.

5. I have heard Mr. ND Nanavati, learned Senior counsel with Mr. Hriday Buch, learned advocate of the petitioner and Mr. VM Pancholi, learned A.P.P. for State of Gujarat. I have also perused the averments made in the petition as well as the complaint registered vide CR No.182 of 2001 with Junagadh City "B" Division Police station for alleged commission of offence under section 306 of IPC and the relevant papers by which the learned Magistrate has refused to grant "C" summary as prayed for by the investigating officer and issued direction to register complaint and to issue non-bailable warrant against the petitioner.

6. On the facts and in the circumstances emerging from the record of the case, it can be seen that against the present petitioner a complaint came to be filed by one Jaisukhbhai Narsangdas Godeshwar Bavaji for alleged commission of the offence under section 306 of IPC on the accusation that deceased Jitendra was serving in the hospital of the petitioner as a ward boy and against him certain allegations of theft and misappropriation are levelled and on a account of the said allegations he consumed poisonous tablets and died leaving a suicidal note.

7. On filing of the FIR the investigation was put into motion and the investigating officer filed a report under section 173 of the Code and requested for C summary as no ingredient of section 306 of IPC was satisfied. The learned Magistrate after hearing the complainant did not agree with the said report and directed to initiate inquiry under section 202 of the Code. In the inquiry held under Section 202 of the Code by the learned Magistrate himself, after recording preliminary statement of witnesses, the learned Chief Judicial Magistrate, Junagadh vide order dated 3.8.2004 concluded that offence under section 306 of IPC is made out against the petitioner and directed to register the complaint for the said offence against the petitioner and also to issue non-bailable warrant making it returnable on 31.8.2004. It is submitted by Mr. Nanavati that if the non-bailable warrant issued by the learned Magistrate is converted into bailable warrant, the petitioner's grievance would be redressed. He therefore urged to modify the impugned order and convert the non-bailable warrant into bailable warrant.

8. According to this court, the prayer made by the petitioner appears to be reasonable and justifiable as by granting the said prayer, no prejudice is going to be

caused to either of the parties. It is seen that the learned Magistrate did not accept the report of the investigating officer for C summary and inquired himself under section 202 of the Code and reached to the conclusion that offence under section 306 of the IPC is made out against the petitioner. He therefore passed order to register complaint against the petitioner for the said offence and straightaway issued non-bailable warrant. According to this Court, the learned Magistrate ought to have issued bailable warrant in first instance and on filing appearance of the petitioner, the learned Magistrate ought to have proceeded further in accordance with law. However, if the petitioner did not appear in pursuance of bailable warrant, then it would have been open for the learned Magistrate to issue non-bailable warrant against him.

9. In aforesaid view of the matter, the order which is impugned in this petition deserves to be modified by converting the 'non-bailable warrant' ordered to be issued by the learned Chief Judicial Magistrate, Junagadh into 'bailable warrant' which would meet the ends of justice.

10. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The order dated 3.8.2004 passed by the learned Chief Judicial Magistrate, Junagadh by which 'non-bailable warrant' is issued against the petitioner is modified and instead of 'non-bailable warrant' it should be 'bailable warrant' against the petitioner. The petitioner will now remain present before the learned Magistrate on 31.8.2004 as directed in the impugned order and thereafter the learned Magistrate shall proceed further in accordance with law. Rule is made absolute.

11. It is made clear that this court has not examined the averments made by the petitioner with regard to the validity of the order dated 3.8.2004 passed by the learned Chief Judicial Magistrate, Junagadh taking cognizance in the inquiry held under section 202 of the Code. It would be open to the petitioner to challenge the said order before appropriate forum which shall be decided in accordance with law.

Direct service is permitted.

(A.M. Kapadia, J.)

(karan)